Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE CITY OF TULSA, OKLAHOMA,
a municipal corporation,

Petitioner,

v.

B.N. SPRADLING, B.C. DOW, J.D. FELLINGER, L.M. LAMB, ROBERT L. McCLARY, PHILIP MORGANS, EDGAR LEON WILSON, F.L. COOK, D.R. GRANT, E.L. SIMPSON, THOMAS E. HOLLAND, ROBERT E. NANTZ, BILLY JOE GEIER, KEN LORTON, and BILLY J. RICHARDSON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a group of employees' pay is "subject to" reduction within the meaning of the Secretary of Labor's "salary basis test," 29 C.F.R. § 541.118(a)(5), where their employer stipulated that it has a policy under which the employees' pay is subject to being reduced, but where the employer has never reduced the pay of any of the employees and where the employer has not reduced the pay of any employee in the same classification as the employees since the Fair Labor Standards Act has applied to the employer.

2. Whether the Secretary of Labor's interpretations of the salary basis requirements for the executive and administrative exemptions in the Fair Labor Standards Act of 1938, 29 U.S.C. § 213(a)(1), apply to a governmental body.

PARTIES BELOW

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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OPINIONS BELOW

This petition seeks review of the decision of a panel of the United States Court of Appeals for the Tenth Circuit, which is reported as *B.N. Spradling et al. v. City of Tulsa, Oklahoma*, 95 F.3d 1492 (10th Cir. 1996), and reproduced at pages A-1 through A-28 in the Appendix to this petition. The decision of the United States District Court for the Northern District of Oklahoma is unreported and is reproduced at pages B-1 through B-18 in the Appendix.

JURISDICTIONAL STATEMENT

The Court of Appeals' opinion and judgment were entered on September 13, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). No petitions for rehearing or hearing en banc were filed.

STATUTES AND REGULATIONS INVOLVED

Section 213(a)(1) of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. § 213(a)(1), exempts executive, administrative, and professional employees from the overtime requirements of the Act, and is reproduced at page C-1 in the Appendix to this petition. The Secretary of Labor's definitions of "executive," "administrative," and "professional" employees are found at 29 C.F.R. §§ 541.1, 541.2, and 541.3 and are reproduced at pages C-1 through C-6 in the Appendix. The Secretary of Labor's regulations concerning the "salary basis test", 29 C.F.R. § 541.118, are set forth at pages C-6 through C-10

of the Appendix. Finally, the Secretary has promulgated "[s]pecial provisions applicable to employees of public agencies" found at 29 C.F.R. § 541.5d. They are reproduced at pages C-10 through C-11 of the Appendix.

STATEMENT OF THE CASE

Under the Fair Labor Standards Act ("FLSA" or "Act"), an employer must pay an employee at one and one-half times that employee's regular rate of pay for all hours worked in one week in excess of 40 hours unless that employee is exempt from the Act. 29 U.S.C. § 207(a)(1).[1] The FLSA exempts from its overtime requirements any employee employed in a "bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor])." 29 U.S.C. § 213(a)(1), Pet. App. C-1.

In order for an employee to fit within the overtime-exempt category for executive, administrative, or professional employees under the Department of Labor's ("DOL") regulations, his or her employer must show that the employee (i) is paid on a salary basis (ii) at a rate of not less than $250 per week, and (iii) that the employee meets the duties test. 29 C.F.R. §§ 541.1 (executive), 541.2 (administrative), 541.3 (professional), Pet. App. C-1 to C-6. This case concerns only the salary basis test.

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[1] Section 7(k) of the Act, however, establishes that public employers need not pay overtime compensation to firefighting personnel until they work in excess of 68 hours in a nine-day work period or up to 212 hours in a 28-day work period. 29 U.S.C § 207(k); 29 C.F.R. §§ 552.201 and 553.230.

Under the DOL's regulations, an employee is considered to be paid "on a salary basis" if the employee "regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of work performed." 29 C.F.R. § 541.118(a), Pet. App. C-1 to C-6. As a general rule, an employee paid "on a salary basis" must "receive his full salary for any week in which he performs any work without regard to the number of days or hours worked," but need not be paid for any week in which he performs no work. *Id.*

There are a few exceptions to that general rule. One is that "[d]eductions may be made . . . when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident." 29 C.F.R. § 541.118(a)(2), Pet. App. C-7. "Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences." *Id.* "Deductions may also be made for absences of a day or more occasioned by sickness or disability . . . if made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability." 29 C.F.R. § 541.118(a)(3), Pet. App. C-7. Finally, an employer may make deductions from an employee's salary for "infractions of safety rules of major significance," 29 C.F.R. § 541.118(a)(5), Pet. App. C-8, or for absences taken pursuant to the Family Medical Leave Act, 29 C.F.R. § 825.206, without affecting an employee's salaried status.

Respondents are fifteen District Fire Chiefs ("District Chiefs" or "Respondents") of the City of Tulsa, Oklahoma

who sued their employer, Petitioner City of Tulsa ("City" or "Petitioner"), for back overtime wages under the FLSA. The District Chiefs and the City entered into the following stipulations:

> 2. By unwritten City policy, Plaintiffs are, and have been at all pertinent times, subject to having their pay reduced for absences of less than a day:
>
> – if they have sick leave, vacation leave, or compensatory time accumulated, those could be reduced to account for the absence;
>
> – if they do not have sufficient accumulations of the above, then Plaintiffs' pay is subject to being docked . . .
>
> 4. By written City policy, Plaintiffs' pay is, and at all pertinent times was, subject to reduction as a form of discipline, including suspension without pay, imposition of a fine, and demotion.
>
> 5. No such reductions have occurred to any of the Plaintiffs. In 1982, the City of Tulsa did suspend without pay District Fire Chief B.J. Reeves (now retired) as discipline for failure to attend a meeting.

Pet. App. D-1 to D-2.

On cross motions for summary judgment, the district court held that the District Chiefs are not exempt administrative or executive employees because they are not paid on a salary basis. Pet. App. B-2 to B-12. The court of appeals affirmed the district court's judgment in favor of the District Chiefs, holding that, under Tenth Circuit precedent,[2] the District Chiefs are not paid on a salary

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[2] The Court, citing *Carpenter v. City & County of Denver*, 82 F.3d 353, 359 (10th Cir. 1996), held that "if an employer's (continued...)

basis because of the *possibility* of an improper reduction in a District Chief's pay, even though none of the District Chiefs had suffered such a deduction. Pet. App. A-19 and A-23. The court relied on the above stipulations and, as further evidence that the City allows the District Chiefs' pay to be reduced, "that district chiefs have been disciplined, on more than one occasion, by a reduction in pay for a reason other than an infraction of a safety rule of major significance." Pet. App. A-23.[3] The court of appeals

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[2] (...continued)
policy concerning absences of less than one day merely creates the possibility of a reduction in pay, the 'salary' test is not met with respect to employees subject to that policy." Pet. App. A-19. In *Carpenter*, the Tenth Circuit joined those Circuits holding that the existence of an employer policy under which an employee's pay could be docked, even if the employee's pay has not been docked, indicates that employees subject to this policy are not paid on a salary basis, and therefore are not exempt from the overtime requirements of the Act. *Hurley v. State of Oregon*, 27 F.3d 392, 395 n. 7 (9th Cir.); *Kinney v. District of Columbia*, 994 F.2d 6, 11 (D.C. Cir. 1993); *Michigan Ass'n of Governmental Employees v. Michigan Dept. of Corrections*, 992 F.2d 82, 86 (6th Cir. 1993); *Klein v. Rush-Presbyterian-St. Luke's Medical Center*, 990 F.2d 279, 285 (7th Cir. 1993); *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 617 (2d Cir. 1991), *cert. denied*, ___ U.S. ___, 113 S. Ct. 298 (1992). The Tenth Circuit rejected the holdings from other circuits that only actual, improper deductions, and not the mere existence of policies, show that an employee is not paid on a salary basis. *Auer v. Robbins*, 65 F.3d 702, 710 (8th Cir. 1995), *cert. granted*, ___ U.S. ___, 116 S. Ct. 2545 (1996); *Barner v. City of Novato*, 17 F.3d 1256, 1261-62 (9th Cir. 1994); *York v. City of Wichita Falls*, 944 F.2d 236, 242 (5th Cir. 1991); *Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991).

[3] The court of appeals' statement that the district court found uncontroverted evidence "that district chiefs have been dis-
(continued...)

did not address the City's arguments that those deductions did not occur to any of the District Chiefs involved in this litigation and that the deductions occurred prior to the date in which the FLSA became applicable to public employers such as the City, apparently finding that such deductions prior to the that time are evidence that the District Chiefs in this case face the possibility of an improper reduction in pay.

Finally, the court of appeals rejected the City's argument that the salary basis test is arbitrary and capricious, and therefore invalid, as applied to public employers. Pet. App. A-8 to A-13.

The issues presented in the present case are nearly identical to the issues presented before this Court in *Auer, et al. v. Robbins, et al.*, No. 95-897. There the Court is reviewing, among other things, whether the salary basis test applies to public employment, and whether employees' pay is "subject to" reduction in violation of 29 C.F.R. § 541.118(a) merely because they are governed by an employer policy that creates the possibility of an improper deduction. If this Court holds in *Auer* that the

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[3] (...continued)
ciplined on more than one occasion, by a reduction in pay for a reason other than an infraction of a safety rule of major significance" refers to Plaintiffs' Exhibits 17, 18A, and 18B. Pet. App. A-23. These three affidavits swear that (i) a District Chief's accrued vacation leave was reduced because of an absence, and (ii) the Tulsa Fire Chief fined or suspended without pay two District Chiefs who are not involved in this litigation for violations of fire department rules. Pet. App. E-1 to E-4. These District Chiefs' fines or suspensions occurred "prior to 1986," *id.*, and therefore prior to the year in which the FLSA became applicable to public employers such as the City.

salary basis test does not apply to public employment, or that the mere possibility of an improper deduction does not render an employee non-exempt, then the Tenth Circuit's decision in the present case could be reversed.

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS AN ISSUE SUBSTANTIALLY SIMILAR TO ISSUES ALREADY PENDING BEFORE THIS COURT.

Last term, the Court granted a petition for certiorari to the Court of Appeals for the Eighth Circuit in *Auer, et al. v. Robbins, et al.*, No. 95-897 (*granting cert.* to 65 F.3d 702 (8th Cir. 1995)). That case is presently before the Court. In *Auer*, the Eighth Circuit rejected the contention of the police sergeants of the St. Louis Police Department that they were not paid on a "salary basis" because the police department's disciplinary policy authorizes less than one-week suspensions without pay for violations of rules that are not safety rules of major significance, finding that under Eighth Circuit precedent, "the mere possibility of an improper deduction" from pay does not defeat an employee's salaried status." *Auer*, 65 F.3d at 710 (citing *McDonnell v. City of Omaha*, 999 F.2d 293, 296 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1188 (1994)).

The court also rejected the argument that a single two-day suspension without pay of one police sergeant for violating a residency requirement rendered all the sergeants, or even the sergeant who suffered the suspension, nonexempt because a "one-time deduction . . . does not automatically require the determination that all

sergeants are nonsalaried." *Id.* The court reasoned that the salary basis test's "window of correction" permits an employer who makes an improper deduction in an employee's salary to maintain that employee's exempt status when there is a "one-time . . . failure to adhere to § 541.118(a)'s requirements," that the police department subsequently and expressly abandoned its policy permitting suspensions in cases of violations of its residency requirement, and therefore, this "disciplinary incident was a one-time incident and can never reoccur." *Id.* at 711. In a footnote, the court recognized the conflict between the Seventh and Ninth Circuits as to whether the salary basis test is invalid as applied to the public sector, but did not reach this question because it held in favor of the police department on other grounds. *Id.* at 710 n. 6.

The police sergeants filed a petition for a writ of certiorari in which it presented the following questions to the Court, among others:

> 1. Does the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, ("FLSA") salary basis test of "white collar" FLSA exemptions apply to the public employees?
>
> 2. Do the United States Department of Labor ("DOL") FLSA salary basis regulations in 29 C.F.R. §§ 541.5d and 541.118(a)(5), which require the loss of exempt status when an employee is "subject to" non-safety disciplinary suspension of less than a pay period apply only in cases of actual suspension or does DOL's interpretation that a personnel rule subjecting employees to discipline alone result in loss of exempt status control the application of the rule?

Pet. for Cert., *Auer, et al. v. Robbins, et al.*, Case No. 95-897, at page (i). The Court granted this petition on June 24, 1996.

These are substantially the same, important questions as presented in this petition:

1. Whether a group of employees' pay is "subject to" reduction within the meaning of the Secretary of Labor's "salary basis test," 29 C.F.R. § 541.118(a)(5), where their employer stipulated that it has a policy under which the employees' pay is subject to being reduced, but where the employer has never reduced the pay of any of the employees and where the employer has not reduced the pay of any employee in the same classification as the employees since the Fair Labor Standards Act has applied to the employer.

2. Whether the Secretary of Labor's interpretations of the salary basis requirements for the executive and administrative exemptions in the Fair Labor Standards Act of 1938, 29 U.S.C. § 213(a)(1), apply to a governmental body.

Supra, at page (i). The questions presented in this petition concern the same conflict among the circuits regarding the interpretation of the Department of Labor's salary basis test and whether it constitutionally applies to the public sector.[4]

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[4] Although the Court of Appeals held in part that there is "uncontroverted evidence" that the "district chiefs have been disciplined, on more than one occasion, by a reduction in pay for a reason other than an infraction of a safety rule of major significance," *Spradling*, 95 F.3d at 1503, Pet. App. A-23, a holding by this Court that only actual deductions from pay render an employee nonsalaried likely would cause the Court of Appeals to reverse itself upon remand because no "improper" deductions have occurred during the period that the City has been covered by the FLSA. *See* footnote 2, *supra*.

CONCLUSION

For the reasons set for the above, Petitioner respectfully requests that this petition for certiorari be granted.

Respectfully submitted,

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